

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

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UNITED STATES OF AMERICA, : Criminal Action No.:  
: 1:16-cr-42  
versus :  
:   
ARDIT FERIZI, : Thursday, March 31, 2022  
:   
Defendant. :  
-----x

The above-entitled hearing was heard before the  
Honorable Leonie M. Brinkema, United States District Judge.  
This proceeding commenced at 10:04 a.m.

A P P E A R A N C E S:

FOR THE GOVERNMENT: DANYA ATIYEH, ESQUIRE  
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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 P R O C E E D I N G S

2 THE DEPUTY CLERK: Criminal Case 16-42, United  
3 States of America versus Ardit Ferizi.

4 Would counsel please note their appearances for  
5 the record.

6 MS. ATIYEH: Good morning, Your Honor.  
7 Danya Atiyeh, Joseph Attias and Mike Gill on behalf of the  
8 United States.

9 THE COURT: Good morning.

10 MS. MULLIN: Good morning, Your Honor. Elizabeth  
11 Mullin and Caroline Platt on behalf of Ardit Ferizi.

12 THE COURT: All right. And I should tell you that  
13 we have two members of Judge Alsup's staff who are listening  
14 in on this proceeding via telephone because they're out on  
15 the west coast, and I want counsel to be aware of that. All  
16 right.

17 Well, we set this hearing today because I was  
18 expecting to get some information from the Government as to  
19 what happened in the California case, and I've not received  
20 anything yet.

21 So, Ms. Atiyeh, do you want to tell me what's  
22 going on?

23 MS. ATIYEH: I will do my best, Your Honor. And  
24 I -- I want to thank Your Honor for calling this hearing  
25 today, because it has put us in a position where we have

1 been able to speak with the Northern District of California  
2 and get answers that were perhaps more satisfying to our  
3 office than what we had before.

4 And, Your Honor, in your order, your initial  
5 question was asking the Government to provide a clear  
6 explanation as to how the decision was made to bring the  
7 California charges and why. And on that point, Your Honor,  
8 I -- I'm not sure that I have a fulsome answer for you.

9 We -- when those charges were filed, Your Honor,  
10 our office filed a notice in this court, and what we said in  
11 that notice was true then, and it's true today. We were not  
12 consulted, we had no information that these charges were  
13 going to be filed until after they already had been. We did  
14 not -- there was no back-and-forth. We had not communicated  
15 with them at all. These charges came as much of a surprise  
16 to us as they did to the Court and to counsel.

17 The AUSA in the Northern District of California  
18 who brought those charges was at the time the chief of their  
19 fraud unit in the San Francisco office. And since that time  
20 in -- at the end of this past year, so at the end of  
21 December of 2021, he left that office, left the Government,  
22 and went to private practice, and we haven't been able to  
23 get in touch with him to get his insights on what evidence  
24 he believed there was or what communications he might have  
25 had with FBI or anything. That, to us, is a black box at

1 this point, Your Honor, and I don't know that we have a way  
2 to get that information.

3 THE COURT: Well, has he completely gone off the  
4 radar? I mean, lawyers are lawyers. I assume he went to a  
5 private firm?

6 MS. ATIYEH: That's my understanding, Your Honor,  
7 but they haven't been in touch with him at all.

8 THE COURT: All right.

9 MS. ATIYEH: At that point -- so at the beginning  
10 of January of this year, a new case team at NDCA came onto  
11 the case. And that -- that case team consisted of two  
12 AUSAs, and also a team I think of two attorneys from CCIPS,  
13 the Computer Crimes and Intellectual Property Section at  
14 Main Justice and, at that point, they began to assess the  
15 evidence in the case.

16 And, Your Honor, I don't know the answer to what  
17 the discrepancy was, but when they looked at that evidence,  
18 they believed that they did not have sufficient evidence on  
19 the mens rea prong of four of the five charges.

20 And this was something that developed between  
21 January, when I first got a call from them asking about  
22 discovery, because it appears that there had been a  
23 substantial amount of discovery from the prior case in EDVA  
24 that had never been reviewed by the NDCA office.

25 So I got a call from the new AUSAs asking me to

1 provide them with additional information, essentially. And  
2 we did so. And there was minimal communication between our  
3 offices for the next several months until about a week or  
4 two before this dismissal was filed when they did contact us  
5 and said that they had conducted their own independent  
6 review of the evidence, this new case team. They believed  
7 that on four of the five counts, the evidence was  
8 insufficient as to mens rea.

9 As to the fifth count, which I believe was the  
10 transfer of identification information count, they believed  
11 that the defendant's guidelines were commensurate with the  
12 length of time he had already served incarcerated pretrial,  
13 and they believed that in the interest of prosecutorial  
14 discretion, it was appropriate to dismiss all of the  
15 charges.

16 THE COURT: Now, the evidence -- so what you're  
17 telling me is that in January of '22, this year --

18 MS. ATIYEH: Yes, Your Honor.

19 THE COURT: -- that your office provided more  
20 fulsome discovery to the California prosecutors?

21 MS. ATIYEH: Yes, Your Honor.

22 THE COURT: And I'm assuming -- because, as I  
23 recall, Mr. Ferizi was extensively debriefed, and I think  
24 that's actually in the defendant's papers when they were  
25 making -- because I've read the pleadings that were filed in

1 California. So I saw the motion talking about vindictive  
2 prosecution, and it went extensively in the debriefings that  
3 Ferizi provided back in 2016, 2017, 2018.

4 So, I mean, the Government -- and, you know, I'm  
5 not, for the record, holding anybody in EDVA responsible for  
6 what happened. Raj Parekh came to me as soon as you all  
7 found out about it and was very, very upset about it.

8 But, you're still part of the Department of  
9 Justice. The FBI is part of the Department of Justice. And  
10 it certainly is pretty clear to me that there were other  
11 members of the Department of Justice who were dissatisfied  
12 with the decision that not only I made, but the Fourth  
13 Circuit by not granting a stay had also given a preliminary  
14 look at the situation and had also ruled that way.

15 So this, in my view, was an attempt to do an  
16 end-run around two courts' decisions that there was no  
17 appropriate basis to stay the deportation of this -- release  
18 and deportation of this defendant. So it is very troubling  
19 what happened here.

20 But, in any case, the defense team in California  
21 pointed out that almost all of the information that appeared  
22 to be involved in the allegations against the plaintiff --  
23 the defendant, were essentially known to the Government.

24 I mean, the way in which this man had gone about  
25 hacking the data that he had, and, you know, if it were

1 considered -- and the Government -- the defense points this  
2 out in their opposition to some of your pleadings in this  
3 case right now. If that information were considered so  
4 significant, that is the data that still is in his computer,  
5 it's inconceivable to me that measures would not have been  
6 taken back in 2018 to get rid of it.

7           You know, on the record, and I said this in my  
8 original order, the Kosovo authorities were fully  
9 cooperative with the United States Government. There's no  
10 reason to believe that they would not have worked with the  
11 FBI in interviewing the brother, in getting those -- the  
12 computers, and getting rid of the data. That's not been  
13 done in this case, as far as I know.

14           I mean, Kosovo helped get the defendant back from  
15 Malaysia, the extradition didn't take very long. I mean,  
16 some extraditions with some of our good allies like the UK  
17 can take years. It took a couple of months to have him  
18 extradited.

19           The record also shows that while he was held in  
20 Kosovo, he was subjected to pretty significant misconduct.  
21 Several months. I'm not blaming the U.S. Government for  
22 that, but I'm just saying that Kosovo knows how to handle  
23 defendants if they're concerned about them. So it's a very,  
24 very troubling case.

25           So you really don't know exactly why this case was

1 dropped other than a re-evaluation of the evidence and a  
2 decision by other prosecutors that there was not sufficient  
3 evidence to go forward?

4 MS. ATIYEH: That's -- I mean, that is accurate,  
5 Your Honor.

6 And I just want to address one thing that you  
7 raised, which is what was or was not known about the  
8 allegations that underlie those charges prior to the charges  
9 being brought.

10 My understanding -- and I was not involved in this  
11 case in 2018 when these proffers were going on. My  
12 understanding is that the information about what  
13 Mr. Ferizi -- whatever activity he undertook while he was  
14 incarcerated in Indiana, that that information came from a  
15 jailhouse informant of some sort. And I was aware -- even  
16 at the time of the filing of the original compassionate  
17 release response, I was aware that those allegations existed  
18 from that jailhouse informant. But that -- that was the  
19 limit of what our office knew at the time.

20 THE COURT: And you didn't -- but that was not  
21 brought to my attention.

22 MS. ATIYEH: It was not, Your Honor. And it was  
23 not because this jailhouse informant was, as I believe --

24 THE COURT: Unreliable.

25 MS. ATIYEH: -- the defense has alluded to, was



1 known to be unreliable.

2 THE COURT: Yeah.

3 MS. ATIYEH: And I would not put that before Your  
4 Honor because there was no additional information to  
5 validate or verify it.

6 And so, at that point after Your Honor granted  
7 compassionate release, it's my understanding that the FBI  
8 decided that that would be a valid line of inquiry to  
9 attempt to discover whether -- whether Mr. Ferizi had,  
10 indeed, engaged in some sort of illegal activity while he  
11 was incarcerated.

12 And, at that point, they did follow-up interviews.  
13 They interviewed a number of other people. They, I suppose,  
14 went into the email accounts. It seems that that's the  
15 point at which they did that. And Your Honor may be right  
16 to say that that should have been done in 2018, but it  
17 wasn't.

18 THE COURT: All right.

19 MS. ATIYEH: Is there anything else I can answer  
20 for Your Honor? I know Your Honor wants to create a record  
21 on this, and I'm happy to answer any questions you have as  
22 far as what our office is aware of or what we know.

23 THE COURT: Well, Ms. Mullin, I'm going to ask  
24 you.

25 Are there any other issues or questions you would

1 like the Court to put to the Government on this one?

2 MS. MULLIN: Court's indulgence.

3 (Pause.)

4 MS. MULLIN: Your Honor, just a brief, I guess,  
5 response.

6 This Court granted compassionate release on  
7 December 3rd, 2020. And we have a 302 provided by the  
8 Government in discovery in Mr. Ferizi's California case that  
9 indicates that on January -- I'm sorry. On December 29th,  
10 2020, so after the compassionate release grant and after, I  
11 believe, this Court denied the Government's request for a  
12 stay, the FBI reached out to Ms. Atiyeh and asked for  
13 permission to access email accounts that were referenced in  
14 Mr. Ferizi's proffer session.

15 So the Government in this -- this office knew that  
16 the FBI was initiating an investigation after this Court had  
17 granted compassionate release. And I think that's one of  
18 the arguments -- or I know that's one of the arguments that  
19 Mr. Ferizi's defense counsel made in his vindictive  
20 prosecution motion. That after this Court granted  
21 compassionate release and after Mr. Ferizi was set to be  
22 deported back to Kosovo, this office knew that the FBI was  
23 initiating another investigation into Mr. Ferizi based on  
24 information that the Government has had since 2018. Or  
25 prior to 2018, because Mr. Ferizi disclosed all of that

1 during his proffer sessions.

2 So we agree with the Court's, I guess inclination  
3 to think that this was an attempt to end-run the Court's --  
4 the authority of the Court and of the Fourth Circuit.

5 THE COURT: All right. Ms. Atiyeh, there is  
6 something else I want you to address, and I don't believe  
7 that you actually were on the brief before the Fourth  
8 Circuit; is that correct?

9 MS. ATIYEH: I was not, Your Honor. Mr. Attias is  
10 here if you need to address any specific questions about  
11 that.

12 THE COURT: Well, the -- in your papers recently  
13 filed, you know, there was -- you sort of tried to downplay  
14 the emphasis on this new investigation and these new charges  
15 as being a -- something that, you know, you really pushed on  
16 the Fourth Circuit.

17 But Ms. Mullin has come back and said that, you  
18 know, that's a disingenuous position because the information  
19 was clearly presented to the Fourth Circuit, and it's  
20 clearly the basis for the Fourth Circuit remand to this  
21 court, and that is troubling.

22 But, in fact, why did you not, when you were  
23 contacted by the FBI, ask the Court at that point to  
24 reconsider its decision rather than wasting the Fourth  
25 Circuit's time?

1 MS. ATIYEH: Your Honor, I think -- I think the  
2 answer to that is, is just the timeline.

3 I -- we were in a position where -- Ms. Mullin is  
4 correct to say that I was aware that the FBI had begun an  
5 investigation into these email addresses. But there was  
6 just a gap in time there, Your Honor, where I was aware that  
7 they were conducting an investigation, and then all of a  
8 sudden there were new charges in California.

9 There was never a point at which FBI came to our  
10 office -- and I will tell Your Honor, to the extent that I  
11 talked about this at all with FBI, I had told them it was  
12 very unlikely that EDVA would have jurisdiction over any  
13 charges resulting from that conduct. So perhaps that's why  
14 they didn't come to our office.

15 But there was no point at which they came back to  
16 our office and said that that investigation into the emails  
17 had borne fruit. If they had, I think we would have gone  
18 back to Your Honor with that information. It's just not how  
19 it played out.

20 THE COURT: Well, what communications did you have  
21 with the FBI after the Court granted the motion for  
22 compassionate release? Because that was done -- you know,  
23 there was one oral argument, and then I think it was just  
24 done on the papers after that. Or did we have a second  
25 argument? I can't recall whether you all --

1 MS. MULLIN: Your Honor, there was one oral  
2 argument.

3 THE COURT: I'm sorry?

4 MS. MULLIN: There was one oral argument, and the  
5 Court granted compassionate release on the papers on  
6 December 3rd, 2020.

7 THE COURT: Right. All right. And the oral  
8 argument that we did have, because that was in the height of  
9 the COVID era, was, as I recall, remote. It was a telephone  
10 conference that we had.

11 MS. ATIYEH: Yes, Your Honor.

12 THE COURT: All right. So there were no FBI  
13 agents listening in on that conversation, on that hearing;  
14 correct?

15 MS. ATIYEH: Correct, Your Honor.

16 THE COURT: All right. So how did the -- what,  
17 it's an agent down in Florida become aware of what was going  
18 on?

19 MS. ATIYEH: Well, Your Honor, the agent down in  
20 Florida was the original case agent on the case here. He  
21 was a WFO agent at the time, and he was following the case  
22 very closely. And he was the agent certainly who had  
23 provided me the limited information that we had about the  
24 accusations from the jailhouse informant that I determined  
25 at the time were not sufficiently substantiated to put into

1 our response. So there had been some conversation.

2 After Your Honor granted the compassionate  
3 release, I mean, there was -- as I'm sure you can  
4 understand, there was substantial communication between our  
5 office generally and FBI. They were upset, Your Honor.  
6 They wanted to know if there was anything that could be  
7 done.

8 And our office was focused on our appeal, Your  
9 Honor. We -- we believed then, and our appeal was filed  
10 prior to the new California charges. That was always the  
11 focus of our office, regardless of whether it meant that  
12 Mr. Ferizi was going to get sent back to Kosovo in the  
13 interim. Our focus was on pursuing the appeal.

14 THE COURT: And excuse me. When did the Fourth  
15 Circuit deny your request for a stay?

16 MS. ATIYEH: I know that it was prior to the  
17 California charges.

18 Do you know the date?

19 MR. ATTIAS: I don't know the date, but it was  
20 prior to the charges.

21 THE COURT: Uh-huh.

22 MS. ATIYEH: There was -- you asked what other  
23 communication there was between our office and the FBI.  
24 There was a lot of discussion -- Your Honor, I can't say  
25 strongly enough that we were trying to uphold Your Honor's

1 order. We were communicating with FBI to try to coordinate  
2 with ICE because FBI had Mr. Ferizi's travel documents.  
3 There was a substantial amount of communication about  
4 finding his passport, his travel documents in the FBI  
5 evidence rooms and getting them to ICE so we could effect  
6 Your Honor's order.

7           There was discussion of FBI conducting some sort  
8 of interview with him before he was deported. There was  
9 discussion with FBI about whether it was possible to get him  
10 a vaccine to further effectuate Your Honor's order. Because  
11 at the time you'll recall, this was -- this was in January  
12 of 2021. Vaccines had become available but not widely so.

13           And ICE was very concerned about their ability to  
14 get Mr. Ferizi back to Kosovo, because he would have had to  
15 pass through a third-party country. Apparently there were  
16 no direct flights, and they were concerned that a  
17 third-party country would be unwilling to take him without  
18 either a vaccine or a lengthy quarantine period.

19           There was a fairly substantial amount of  
20 discussion about all of this against the background of my  
21 understanding is FBI continuing to pursue this investigation  
22 that our office was largely remote from. And I don't know  
23 the reason for that, other than, as I said earlier, Your  
24 Honor, that we told them if this was conduct that occurred  
25 while he was incarcerated in Indiana, our district is

1 unlikely to have jurisdiction. And so presumably they were  
2 working with AUSAs in other districts. I had assumed they  
3 would have been working in Indiana, so I was particularly  
4 surprised by California charges, Your Honor.

5 THE COURT: Yeah. Maybe Indiana didn't want to  
6 touch it.

7 MS. ATIYEH: That's entirely possible, Your Honor.  
8 I don't know.

9 THE COURT: All right. Well, I will tell you,  
10 I -- I mulled around in chambers whether I was going to file  
11 a referral to the Inspector General for DOJ, because I  
12 thought what happened here was really very troubling in that  
13 it evidenced to me a mindset that two different courts  
14 having granted -- or decided that there was no basis to stay  
15 this man's deportation, it didn't sit well with the powers  
16 that be, and so they were going to do an end-run around it.  
17 Very troubling. This is not a good record.

18 At the same time, I decided that rather than  
19 making such a firestorm, I would simply handle the case the  
20 way I'm going to handle it today.

21 I know that the remand -- and I know that you've  
22 argued that in the remand the Fourth Circuit indicated the  
23 Court should consider other factors than these charges,  
24 which I think are an absolute nullity at this point. I  
25 don't believe there's any sufficient evidence of any



1 misconduct while this man was in custody.

2           Again, I cited in the original opinion that the  
3 BOP still -- and I guess they were somewhat aware of the  
4 FBI's interest in Mr. Ferizi, still ranked him as low in  
5 terms of the danger that he poses. They took him from Terre  
6 Haute and put him to the lower level -- not a low level, but  
7 to the medium facility. They ratcheted down the level of  
8 his incarceration. And I think the way he's been treated  
9 and the fact that he's spent more than a year of additional  
10 time in custody because of what happened here is appalling.

11           You know, the biggest danger this country has to  
12 its stability and not necessarily from ISIS and outside  
13 sources; it's more internal. And especially if our own law  
14 enforcement people are not willing to respect and comply  
15 with the law and decisions of the Court and do it in the  
16 proper fashion, I think that's more insidious and more  
17 dangerous ultimately than these attacks from outsiders. So  
18 this is a bad case, and I'm considering that in the reasons  
19 for my decision.

20           But I am going to reaffirm my decision that  
21 Mr. Ferizi is entitled to compassionate release. The  
22 argument that there's been a change -- a material change in  
23 condition in terms of COVID I think is not a good one.

24           Number 1, this man does have, and the Government's  
25 admitted it, that he has medical conditions that make him

1 particularly susceptible to and vulnerable to the virus,  
2 should he contract it. And we know that B.2 is beginning a  
3 resurgence of potential problems. Just today, I believe,  
4 the CDC has now announced that they're recommending a second  
5 booster for vulnerable populations. The president got a  
6 shot I believe this morning or yesterday. I heard on the  
7 news this morning that Shanghai is now being shut down by  
8 the Chinese government because they are having a resurgence  
9 of COVID infections in that part of the world. Europe is  
10 undergoing significant resurgence. And we all know that  
11 prison populations are not safe.

12           So I think nothing in my view has changed. If  
13 anything, the record has gotten nastier in this case. And  
14 as I said before, I think Kosovo is able to adequately work  
15 with the FBI if they believe that any misconduct is going on  
16 with this man. He'll clearly be on their radar screen.

17           And he is -- as I said in my previous order, he  
18 still is under ten years of supervised release. If he gets  
19 involved in rehacking or doing something that violates U.S.  
20 law, the United States Government has a long reach, and  
21 you've got obviously good relationships with Kosovo. So  
22 there's no reason to believe that he can't be brought back  
23 here if he starts to hack into American databases or  
24 starting to use American identities in some sort of  
25 nefarious conduct.

1           So I don't think that, in this case, there is the  
2 kind of risk to the public that would otherwise be the case.  
3 I don't find that any of the information that's been brought  
4 to my attention makes a material difference to my decision  
5 that this man is an appropriate candidate for compassionate  
6 release. So I am, today, reinstating that order, which  
7 means the Government can go forward if it still wishes to  
8 appeal that, that's fine.

9           My understanding is that Judge Alsup had ordered  
10 the defendant to be placed into ICE custody. He, I believe,  
11 stayed execution of that order for one week, which I think  
12 probably has now elapsed. But I am going to direct that he  
13 be turned over to ICE custody. I am assuming that the FBI  
14 did find his passport and that there are no other actions by  
15 the FBI that would be holding up his deportation.

16           MS. ATIYEH: Yes, Your Honor. That's correct.

17           THE COURT: All right. And so I will add to my  
18 order that he is to be expeditiously removed from the United  
19 States. All right.

20           Obviously I'm not going to grant a stay, in case  
21 you were planning to request that. So your next step is, as  
22 Judge Lewis used to say, invoke the rule of 95 and go down  
23 to Richmond if you want to continue pursuing this issue.  
24 All right?

25           MS. ATIYEH: Yes, Your Honor.

1 THE COURT: Is there anything further? Defense  
2 counsel didn't get much of a chance to say much.

3 Ms. Mullin, did you want to put anything on the  
4 record?

5 MS. MULLIN: No, Your Honor. Thank you.

6 THE COURT: Have you been in contact -- just for  
7 my information -- come up to the lecturn.

8 Have you been in contact with Mr. Ferizi at all?

9 MS. MULLIN: Not directly. Through his California  
10 attorney.

11 THE COURT: And how is he doing?

12 MS. MULLIN: He's -- he's doing okay. We've been  
13 in contact with his family, actually, his mother. And she's  
14 eagerly awaiting his return. But he's doing okay. Thank  
15 you, Your Honor.

16 THE COURT: All right. All right. That's fine.

17 All right. Is there anything further on this  
18 case?

19 MS. MULLIN: No, Your Honor.

20 MS. ATIYEH: Nothing from the Government, Your  
21 Honor.

22 THE COURT: All right. The last thing I'll say to  
23 the Government is, you know, you're still responsible for  
24 watching your agents. One of the toughest jobs a good AUSA  
25 has is sometimes riding herd on the agents that work for

1 all. And, you know, that same problem comes to haunt  
2 prosecutors with discovery.

3 You're the officer in court, and you represent the  
4 United States Government. And if you've got an FBI agent  
5 working behind the scenes who's not playing by the rules,  
6 ultimately it comes back to bite the AUSA or the AUSA's  
7 office; all right?

8 So, going forward -- I recognize there's a great  
9 deal of intense feelings, especially about these types of  
10 cases, but that doesn't trump the requirement that the rules  
11 be followed; all right?

12 MS. ATIYEH: Your Honor, I wholeheartedly agree,  
13 and I think there may be some conversations going on behind  
14 the scenes as to that issue.

15 THE COURT: I would hope so. Thank you.

16 MS. ATIYEH: Yes.

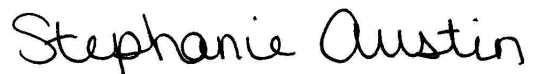
17 THE COURT: We'll recess court for the day.

18 MS. ATIYEH: Thank you, Your Honor.

19 (Proceedings adjourned at 10:30 a.m.)

20 -----

21 I certify that the foregoing is a true and accurate  
22 transcription of my stenographic notes.

23   
24 \_\_\_\_\_

25 Stephanie M. Austin, RPR, CRR